Koperasi Belia Bersatu Bhd to the appellant dated 13 November 1986 (p 31 in the appeal record), in our view, puts the position clear. The letter reads as follows:

> I am directed by the board to inform you that the board had terminated your position as general manager in Kosatu with immediate effect. As you were all this while seconded as acting general manager of Kin Kwok Daily News Sdn Bhd. The board now appointed you as full-time general manager of Kin Kwok Daily News Sdn Bhd.
>
> Kindly arrange to hand over motor vehicle bearing registration no WBE 4937 and other relevant documents of Kosatu and its subsidiaries at your earliest possible.

The minister had a discretion under s 20(3) of the Act and that is not in dispute. The issue is whether the discretion is unfettered. To say it is an unfettered discretion is a contradiction in terms. Unfettered discretion is another name for arbitrariness.

The minister's discretion under s 20(3) is wide but not unlimited. As stated earlier, so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had mis-directed himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute. Otherwise he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious which in our view this is one.

The appeal is accordingly allowed with costs here and below. The order of the learned judge is set aside.

Appeal allowed.

Solicitors: *Chan Yat Hee & Associates.*

Reported by *Prof Ahmad Ibrahim*

Malayan Banking Bhd & Anor v Swasta Jaya Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-315-1989
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
10 FEBRUARY 1990

Civil Procedure — Judgment in default of appearance — Stamped copy of memorandum of appearance not handed back on same day — Appearances not registered in cause book — Irregularities in High Court registry — Judgment not regular — Judgment in default set aside — Rules of the High Court 1980, O 2, O 10, O 12 & O 13

The plaintiffs (the respondents) had sued the defendants for breach of a loan agreement and served the writ on the defendants on 14 April 1989. The third defendant entered appearance on 17 June 1989 while the first and second defendants did so on 21 June 1989. On 19 June 1989, the defendants' solicitors sent a copy of the memorandum of appearance to the plaintiffs' solicitors in Ipoh. On 21 June 1989, they sent another copy of the memorandum of appearance to the plaintiff's solicitors in Ipoh. They did not send the stamped copy on the same day as they did not get back the stamped copy from the registry of the High Court on the same day. The plaintiffs made a search on 22 June 1989 and found no memorandum of appearance. So on the same day they obtained two certificates of non-appearance against the second and third defendants and on that day they obtained two judgments in default of appearance each for the sum of $14,250,000 against the second and third defendants. The plaintiffs then started execution proceedings against the second and third defendants. On the same day, the defendants applied to have the judgment in default of appearance and the execution proceedings set aside. An interim stay of execution was granted and was the senior assistant registrar, who heard the defendants' application, set aside the judgment in default of appearance against the second and third defendants and gave them 14 days to file their defence. On appeal, the judge of the High Court allowed the appeal and set aside the order of the senior assistant registrar. The second and third defendants appealed.

Held, allowing the appeal:

(1) In this case, the registry did not comply with the standing practice of handing back the stamped copy of the memorandum of appearance on the same day so it was not possible for the defendants to send it to the plaintiffs on the same day. If the registry had registered the appearances in the cause book, then the plaintiffs would not have been able to obtain the certificate of non-appearance. The learned judge considered that the defendants should have written to the plaintiff's solicitors to inform them of the nature of the delay and extending a copy to the High Court Registry. The defendants did their best by sending a copy of the memorandum of appearance which would have put the plaintiffs on the alert.

(2) The fact that the defendants were at fault does not necessarily mean that they must be penalized at all costs, particularly when the registry was as much, if not more, to blame. The learned judge should have caused an investigation to be made at the registry instead of putting all the blame on the defendants. In the light of the irregularities, the court could not agree with the learned judge that the judgments were entered regularly as appearances were clearly entered and should have been registered by the registry. As an injustice had been done, the appeal should be allowed and the judgment of the learned judge set aside and the order of the senior assistant registrar restored.

[Pihak perayu (defendan kedua dan ketiga) dan Sabah Development Bank Bhd (defendan pertama) telah bersetuju meminjam kepada responden (plaintif) jumlah wang pokok $9.5 juta untuk projek perumahan atas syarat-syarat yang termaktub di dalam perjanjian yang dibuat oleh pihak-pihak itu. Plaintif mendakwa yang defendan-defendan telah melanggar perjanjian itu dan ia membuat tuntutan terhadap mereka. Writ telah disampaikan kepada defendan pada 14 April 1989. Defendan ketiga telah memasukkan kehadiran pada 17 Jun 1989, sementara defendan pertama dan kedua telah membuat demikian pada 21 Jun 1989. Pada 19 Jun 1989, peguamcara pihak defendan telah menghantar salinan memorandum kehadiran kepada peguamcara plaintif di Ipoh. Pada 21 Jun 1989, mereka telah menghantar satu lagi salinan memorandum kehadiran kepada peguamcara plaintif di Ipoh. Mereka tidak menghantar salinan yang telah disetem pada hari yang sama oleh kerana mereka tidak mendapat balik salinan yang telah disetem itu dari pejabat pendaftaran Mahkamah Tinggi pada hari itu juga. Plaintiff telah membuat pemeriksaan-cari di pejabat pendaftaran mahkamah pada 22 Jun 1989 dan tidak terdapat apa-apa memorandum kehadiran. Oleh kerana itu, pada hari yang sama ia telah mendapat dua perakuan ketidakhadiran terhadap defendan kedua dan ketiga dan pada hari itu juga telah mendapat dua penghakiman ingkar kehadiran setiapnya untuk jumlah $14,250,000 terhadap defendan kedua dan ketiga. Ia kemudiannya memulakan tindakan pelaksanaan terhadap defendan kedua dan ketiga. Pada hari itu juga, defendan-defendan telah memohon supaya penghakiman ingkar kehadiran dan tindakan pelaksanaan itu diketepikan. Penggantungan pelaksanaan sementara telah diberi dan permohonan defendan-defendan itu dirujukkan kepada penolong kanan pendaftar untuk diputuskan antara pihak-pihak itu. Penolong kanan pendaftar yang mendengar permohonan itu telah mengenepikan penghakiman ingkar kehadiran itu terhadap defendan kedua dan ketiga dan memberi mereka 14 hari memfailkan pembelaan mereka. Plaintif telah merayu. Hakim Mahkamah Tinggi telah membenarkan rayuan dan mengenepikan perintah penolong kanan pendaftar. Defendan kedua dan ketiga telah merayu.

Diputuskan, membenarkan rayuan:

(1) Di dalam kes ini, Pejabat Pendaftaran Mahkamah telah tidak mematuhi amalan tetap untuk memberi balik salinan yang telah disetem bagi memorandum kehadiran pada hari sama dan oleh kerana itu tidaklah dapat defendan menghantarkannya kepada plaintif pada hari itu juga. Jika Pejabat Pendaftaran Mahkamah telah mendaftarkan kehadiran-kehadiran itu di dalam buku guaman, tentulah plaintif tidak boleh mendapatkan akuan ketidakhadiran itu. Hakim yang arif telah berpendapat bahawa defendan seharusnya menulis kepada peguamcara plaintif untuk memberitahu mereka butir-butir kelambatan itu dan memberi salinan surat itu kepada Pejabat Pendaftaran Mahkamah. Defendan telah membuat apa yang dipandang terbaik olehnya iaitu mengirimkan salinan memorandum kehadiran itu yang mana seharusnya membuatkan plaintif berjaga-jaga.

(2) Hakikat bahawa defendan-defendan bersalah tidak semestinya bermakna mereka terpaksa dihukum, lebih-lebih lagi apabila Pejabat Pendaftaran Mahkamah sama-sama, kalau tidak lebih, bersalah. Hakim yang arif sepatutnya menjalankan siasatan di Pejabat Pendaftaran itu dan tidak membeban semua kesilapan itu ke atas defendan. Memandang kepada perkara-perkara luar aturan di dalam kes ini, mahkamah rayuan tidak dapat bersetuju dengan hakim yang arif bahawa penghakiman-penghakiman telah diperolehi mengikut aturan, oleh kerana jelas kehadiran telah dimasukkan dan seharusnya didaftarkan di Pejabat Pendaftaran Mahkamah. Oleh kerana ketidakadilan telah berlaku, rayuan hendaklah dibenarkan, dan penghakiman hakim yang arif diketepikan dan sebaliknya perintah penolong kanan pendaftar dikuatkuasakan semula.]

Cases referred to

1 *Smith* v *Dobbin* (1877) 3 Ex D 338 (refd)
2 *Tan Ting Kok* v *Cheong Lep Keen & Anor* [1969] 1 MLJ 153 (refd)
3 *Cheah Teong Tat* v *Ho Gee Seng & Ors* [1975] 2 MLJ 149 (refd)
4 *Evans* v *Bartlam* [1937] AC 473 (refd)
5 *Seng Huat Hang Sdn Bhd* v *Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348 (refd)
6 *Taman Pangkor* v *Doric Development Sdn Bhd & Ors* [1987] 2 CLJ 266 (refd)
7 *Syarikat Joo Seng & Anor* v *Habib Bank Ltd* [1986] 2 MLJ 129 (refd)
8 *Metroinvest Anstalt & Ors* v *Commercial Union Assurance Co plc* [1985] 2 All ER 318 (refd)

Legislation referred to

Legal Profession (Practice and Etiquette) Rules 1978 r 56
Rules of the High Court 1980 O 2, O 10 r 1(4), O 12 rr 2, 3, O 13 r 6

Appeal from: Civil Suit No D-22-503-1989 (High Court, Kuala Lumpur)

JJ Puthucheary (*DP Naban* with him) for the appellants.
RR Chelliah (*SA Lingam, A Mahendran* and *KY Leong* with him) for the respondents.

Cur Adv Vult

Lee Hun Hoe CJ (Borneo) (delivering the judgment of the court): We allowed the appeal and stated we would give our reasons later. We do so now.

The Sabah Development Bank Bhd (first defendant) and the appellants (second and third defendants) agreed to lend the respondents (plaintiffs) a total aggregate principal sum of $9.5m for a housing project upon terms and conditions as set out in an agreement entered into by the parties on 5 July 1984. The plaintiffs alleged that the defendants were in breach of the agreement and sued them. The writ was served on the defendants on 14 April 1989. The third defendant entered appearance on 17 June 1989 while the first and second defendants did so on 21 June 1989 which was a Saturday. On 19 June 1989, the defendants' solicitors sent a copy of the memorandum of appearance dated 17 June 1989 to the plaintiffs' solicitors in Ipoh. On 21 June 1989 they sent another copy of the memorandum of appearance dated 20 June 1989 to the plaintiffs' solicitors in Ipoh. They did not send the stamped copy on the same day as they did not get back the stamped copy on the same day.

According to the plaintiffs, they made a search on 22 June 1989 and no memorandum of appearance was found. So, on that day they obtained two certificates of non-appearance against the second and the third defendants. Also, on that day they obtained two judgments in default

of appearance each for the sum of $14,250,000 against the second and the third defendants. On 27 June 1989, the plaintiffs started execution proceedings against the second and third defendants. By summons-in-chambers dated 27 June 1989, the defendants applied to have the judgment in default of appearance and the execution proceedings set aside. Earlier that day, Anuar J granted an interim stay of execution and directed that the said summons-in-chambers be disposed of by the senior assistant registrar on an inter partes basis. It was heard by the senior assistant registrar on 5 July 1989 and she set aside the judgment in default of appearance against the second and third defendants and gave them 14 days to file their defence. The plaintiffs appealed. On 21 August 1989, Anuar J allowed the appeal and set aside the order made by the senior assistant registrar on 5 July 1989. Hence the appeal before us.

Encik JJ Puthucheary for the defendants conceded that they did not send the copy of the memorandum of appearance on the same day. He explained that they did not get the stamped copy back on the same day, so they could not post it the same day. They got the stamped copy after the judgment was entered. So that it was impossible to comply with O 12 r 3 of the Rules of the High Court 1980. His contention is that there is a distinction between entering and serving and that under O 2 r 2(1), non-compliance with the rules would be curable. Non-compliance of service can be remedied but would not renegade appearance.

The relevant provisions of O 2 of the Rules of the High Court 1980 provide:

> O 2 r 1(1)
> Where, in the beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> O 2 r 2(1)
> An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

The learned judge took the view that the failure to serve the stamped copy of the memorandum of appearance on the plaintiffs was fatal and therefore the judgments dated 22 June 1989 were entered regularly. He considered that the defendants by filing the summons-in-chambers dated 27 June 1989, after being aware of the judgments in default of appearance, had taken a fresh step in the proceedings and therefore could not rely on O 2.

The defendants submitted that the learned judge should have rectified the matter instead of saying that the defendants had taken a fresh step after being aware of the irregularity which amounted to a waiver. The fact that the defendants applied to have the judgments set aside cannot be aside to be taking a fresh step. The reference must be the other side who has taken a fresh step to make any sense. It was submitted that as the plaintiffs obtained judgments in default of appearance without jurisdiction, the defendants were entitled to have the judgments set aside as appearances had in fact been entered. Further, the affidavit of service does not state the day of the week of service and the capacity of the person served and has therefore not complied with O 10 r 1(4) of the Rules of the High Court 1980 which reads:

> Where a writ is duly served on a defendant otherwise than by virtue of paragraph (2) or (3), then, subject to Order 11 rule 5, unless after service the person serving it indorses on it the following particulars, that is to say, the day of the week and date on which it was served, where it was served, the person on whom it was served, and, where he is not the defendant, the capacity in which he was served, the plaintiff in the action begun by the writ shall not be entitled to enter final or interlocutory judgment against the defendant in default of appearance or in default of defence, unless the Court otherwise orders.

Once these are properly endorsed, the plaintiffs are entitled to obtain summary judgment without permission of the court.

Encik RR Chelliah for the plaintiffs submitted that non-compliance of O 12 r 3(2) was fatal. He cited *Smith* v *Dobbin*;[1] *Tan Ting Kok* v *Cheong Lep Keen & Anor*;[2] and *Cheah Teong Tat* v *Ho Gee Seng & Ors*.[3]

The learned judge referred to O 12 which deals with matters concerning appearance. Order 12 r 1 regulates the mode of entering appearance. Order 12 r 2 stipulates that the memorandum of appearance must be in specific form. Order 12 r 3 prescribes the procedure on receipt of the requisite documents. Order 12 r 3 reads:

> (1) On receiving the requisite documents an officer of the Registry must in all cases affix to the copy of the memorandum of appearance an official stamp showing the date on which he received those documents and enter the appearance in the cause book, and
>
> (a) if the requisite documents were handed in at the Registry, hand back that copy of the memorandum; and
>
> (b) if they were sent by post, send that copy by post to the plaintiff or, as the case may be, his solicitor at the plaintiff's address for service and also send by post to the defendant or, as the case may be, his solicitor at the defendant's address for service a notice of appearance (stamped with an official stamp showing that date) stating that the defendant specified therein entered an appearance on that date.
>
> (2) Where the defendant enters an appearance by handing in the requisite documents at the Registry, he must on the date on which he enters the appearance send by post to the plaintiff, if the plaintiff sues in person, but otherwise to the

plaintiff's solicitor, at the plaintiff's address for service, the copy of the memorandum of appearance handed back to him under para (1).

The question is whether the judgment in default of appearance is regular or irregular. The answer would depend on whether either of the defendants had entered appearance on 22 June 1989. The learned judge held that the judgment was entered regularly. Therefore, O 2 r 2(1) does not assist the defendants as only the affidavit of Encik Naban was to the effect that the defendants had filed the memorandum of appeal within time. The learned judge also said the defendants took a fresh step after being aware of the irregularity. The question of liquidated sum was never raised before the senior assistant registrar or the learned judge. The only point they took was the matter of appearance. The figure of $14,250,000 was agreed and arrived at by the parties on facts agreed by the parties. Regular judgment should not be set aside except on an affidavit of merits. (*Evans* v *Bartlam*;[4] *Seng Huat Hang Sdn Bhd* v *Chee Seng & Co. Sdn Bhd.*[5])

Rule 56 of the Legal Profession (Practice & Etiquette) Rules 1978 provides that:

> Judgment by default. Where the name of the advocate and solicitor or his firm appears on the court record or the fact of representation is known to the other side, no advocate and solicitor representing the other party to the proceedings shall enter judgment by default against the client of the first named advocate and solicitor or to take advantage of delay in pleading or filing documents in the nature of pleadings or taking any necessary steps or in complying with any other in the proceedings by such first named advocate and solicitor, unless he shall have given to such first named advocate and solicitor written notice of his intention to do so, and forty-eight hours shall have elapsed after the delivery of such notice to the first named advocate and solicitor.

This is what is known as the 48-hour rule and is binding among the legal practitioners. The plaintiffs said the rule could only apply if there was someone on the other side. They found no appearance had been entered. On the other hand, the defendants maintained that if the rules were not complied with then judgment could not be regular.

The defendants contended that the plaintiffs had also not complied with O 13 r 6. It is rare for a plaintiff to sign judgment when appearance has already been entered. Order 13 r 6 provides:

> (1) Where a writ is indorsed with a claim of a description not mentioned in rules 1 to 4, then, if any defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the statement of claim was not indorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had entered an appearance.

As the appeal is concerned with a question of law, there is no need to have evidence. It was submitted that the learned judge did not conform to the rules. In his judgment, he cited a number of cases but the argument was not in pari materia with the case concerned. Rule 61 of the Rules of the Supreme Court 1980 does not contain anything like O 2 r 2(1) of the Rules of the High Court 1980.

In *Taman Pangkor* v *Doric Development Sdn Bhd & Ors*,[6] Peh Swee Chin J in adopting the reasoning of this court in *Syarikat Joo Seng & Anor* v *Habib Bank Ltd*[7] when he dealt with O 13 r 6(1) stated the position correctly at p 267:

> It is clear from O 13 rr 1 to 6 of the Rules of the High Court 1980 that the prayers (1), (2) and (3) of the statement of claim as set out above, were not of the description mentioned in O 13 rr 1 to 5, but fitted in squarely with O 13 r 6(1) so that the plaintiff would be precluded from entering judgment for default of appearance forthwith, and would be, notwithstanding the non-appearance, required to proceed with the action as if the defendant had entered an appearance.
>
> In these circumstances, the plaintiff under the present rules of the High Court, ought to have proceeded further either by summons under O 81 of the Rules of the High Court (on the ground that the third defendant had no defence), for rescission of the agreement in question as prayed and allied reliefs, or a summons or motion for judgment under O 19 r 7, after the expiry of the time for service of defence for default of defence, for such judgment as the plaintiff appeared entitled to on its statement of claim.

Next, it is the submission of the defendants that the irregularity in appearance under O 12 r 1(3) is not fatal. *Metroinvest Anstalt & Ors* v *Commercial Union Assurance Co plc*[8] was cited.

In *Evans* v *Bartlam*,[4] it is clearly stated that while the Court of Appeal will normally not interfere except on grounds of law with the exercise of the judge's discretion, if it is seen that on other grounds his decision would result in injustice being done, the Court of Appeal has both the power and the duty to remedy it. As Lord Atkin pointed out at p 480:

> The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

At p 9 of the supplementary appeal record, the learned judge pointed out quite rightly that it is the standing practice of the registry to hand back a copy of the memorandum of appearance at the time it was tendered together with the memorandum of appearance. The question is whether this standing practice was followed in respect of this case. According to the defendants they did not get the stamped copy back on the same day so they could not send it to the plaintiffs on the same day.

At p 6 of the supplementary appeal record, the learned judge referred to the memorandum of appearance in these words:

> Enclosures 7 and 8 are memorandum of appearances filed by the third and second defendants. The respective memoran-

dum of appearances (encls 7 and 8) bear the official stamp of the registry dated 17 and 21 June 1989. These enclosures dated 17 and 21 June 1989 should have been registered before encls 3, 4, 5 and 6, which were filed on 22 June 1989. It is clearly observed that the memorandum of appearance (encl 7), besides having the official stamp showing that it was received on 17 June 1989 at 2pm, also has another stamp as having been received on 27 June 1989 at 9am. Whereas, encl 8 bears the official stamp as having been received on 20 June 1989 at 2pm, also carries another stamped date at the bottom as 27 June 1989. I find encls 7 and 8 irregular primarily because of the conflicting dates.

He was quite right to say that these enclosures dated 17 and 21 June 1989 should have been registered before encls 3, 4, 5 and 6 which were filed on 22 June 1989. But why were they not registered on the days of filing and payment in the cause book? Something must be wrong at the registry. If they were registered in the cause book, the plaintiffs could not possibly obtain the certificates of non-appearance to enable them to obtain judgments in default of appearance.

The memorandum of appearance dated 17 June 1989 has the official stamp as having been received on that date at 2pm and another stamp as having been received on 27 June 1989 at 9am. Similarly, the memorandum of appearance dated 20 June 1989 has the official stamp as having been received on that date at 2pm and also another stamp at the bottom as having been received on 27 June 1989. These irregularities can only be answered by the registry. Whoever was in charge of the stamp would have to explain the irregularities.

In fact Encik RR Chelliah brought these irregularities to our attention. It was pointed out that 17 June 1989 was a Saturday and nothing could be done in the afternoon at 2pm. Yet, the stamp showed that it was received on that date at that time.

We were very disturbed by all these incidents. Something was clearly wrong in the registry or someone was careless in the registry and had not followed standard practice otherwise these incidents could not have occurred in the registry. In particular, we would like to know why appearances were not entered in the cause book. We would recommend a thorough investigation into these incidents in the hope that similar incidents would not occur in the future.

If the registry did not comply with the standing practice of handing back the stamped copy of the memorandum of appearance on the same day, how would it be possible for the defendants to send it to the plaintiffs on the same day? If the registry had registered the appearances in the cause book, then the plaintiffs would not have been able to obtain the certificates of non-appearance. The learned judge considered that the defendants should have written to the plaintiffs' solicitors to inform them of the nature of the delay and extending a copy to the High Court Registry. The defendants did their best by sending a copy of the memorandum of appearance which would have put the plaintiffs on the alert.

We have taken the trouble to call for and check the praecipes from the records of the registry. The numbers on the praecipes were in running series. The prescribed fees were clearly paid on 17 June 1989 and 20 June 1989 and received by the officers of the registry whose names were clearly recorded on the praecipes. Appearance is a very important process by which a defendant shows his intention to defend and submits himself to the jurisdiction of the court.

The fact that the defendants were at fault does not necessarily mean that they must be penalized at all cost, particularly when the registry was as much, if not more, to blame. The learned judge should have caused an investigation to be made at the registry instead of putting all the blame on the defendants. In the light of the irregularities, we could not agreed with the learned judge that the judgments were obtained regularly as appearances were clearly entered and should have been registered by the registry. As we considered that an injustice had been done we ought to remedy it. Accordingly we allowed the appeal with costs both here and the court below. We set aside the judgment of the learned judge and restored the order made by the senior assistant registrar. We also ordered the case be heard by another judge.

Appeal allowed.

Solicitors: *Skrine & Co; Mahendran & Co.*

Reported by *Prof Ahmad Ibrahim*